No. 583.
Brief of Plaintiff in Error
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JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

JOHN ANDERSEN, Plaintiff in Error,

vs.

THE UNITED STATES, Defendant in Error.

BRIEF FOR THE PLAINTIFF IN ERROR.

GEORGE McLANAHAN, Counsel.

R. L. Jackson, Printer, Norfolk, Va.

In the Supreme Court of the United States of America.

JOHN ANDERSEN, Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA.

To the Honorable Judges of the Supreme Court of the United States of America:

Your petitioner, John Andersen, respectfully presents the following case:

The plaintiff in error was indicted in the United States Circuit Court for the Eastern District of Virginia at the term commencing the first Monday in November, 1897, and the indictment charged the defendant with the crime of murder, for the killing of one William Wallace Saunders on an American vessel upon the high seas.

The defendant was tried at said court in December, 1897, and was convicted by the jury of murder and was sentenced to be hanged. He then sued out a writ of error to this court, and he respectfully submits to the consideration of this honorable court the following assigned grounds of error and exceptions, taken by his counsel:

The references are to the marginal paging of the printed records.

1. The indictment charges the homicide to have been committed by shooting and drowning, which are means

inconsistent in themselves, not of the same species, and therefore impossible to have occurred as alleged.

Minor's Institutes Crim. Law, 54.
4 Bl. Com. 190.
1 Russ, Cr. 465-7.
1 Wharton Cr. Law (8th ed.), Sec. 519.
3 Greenleaf's Evid, 141.

At common law (and there has been no modification by statute) the indictment should charge the offense as committed. No variation was tolerated except that it was permitted to prove the homicide to have been committed by a means of the same species as that alleged.

Where the homicide was alleged in the same count to have been committed in two ways thoroughly inconsistent and not of the same species it was and is likewise demurrable.

2. The venire for the jury in this case (p. 12) was a venire for a special jury summoned after the term began. It was not the regular jury for the term, which was not used. It does not appear that it was authorized by any order of court or was summoned for the purpose of trying this case by order of court. The *record* should show that it was summoned for the trial of this case; that it was a special jury for that purpose, and that it was summoned by order of court.

The law requires the venire to be summoned for the term before the term begins; that is to say, the regular venire for the trial of cases at the ensuing term. If that jury is discharged, or for any reason it is improper to use it, a new writ must issue by order of court, and the record should show that it was so ordered.

The term began November 1st, 1897.

Revised Statutes, Sec. 658.

The jury that tried this case was not summoned until December 6th, 1897, and this, therefore, was not the regular jury that was summoned before the term began. No order was entered for this special jury being summoned, but it was summoned by the clerk issuing the writ without an order.

The special jury must be summoned by an order of court.

Revised Statutes U. S., Sec. 803.

3. The third assignment of error is to the question or questions asked A. J. Hall, a witness introduced for the Government. Hall was put upon the stand and asked a series of hypothetical questions. Hall was not present on the schooner at the time of the homicide. He was not examined as an expert, and he disclaims all knowledge of the condition of the vessel at the time of the homicide, either as to the way in which her sails were set, the character or condition of her deck load, or any other *fact* as to her then condition.

He was asked the question, "Is it customary in loading vessels with a deck load of lumber to leave passage-ways or stairways to go down in different parts of the vessel?" p. 36.

His answer was, "We most always do that when we can when the lumber comes right, but sometimes we have to go right over it when we can't."

He was then asked, "Are you not familiar with the deck load of the "Olive Pecker" when she sailed from Boston on the 20th of June?" "No, I know nothing about that."

The defendant moved to strike out the testimony as to what was customary. The matter was not in issue as to

the custom or non-custom, or any method of loading the vessel, but as to the particular state of affairs which existed then at the time of the homicide, and the witness having answered (p. 36) that he knew nothing about the condition of the deck load of the "Olive Pecker" when she sailed from Boston, or on the 20th of June, it should have been struck out at the instance of the defendant.

If the usages or custom or usual method of loading the vessel had been in any wise involved in this, the question and answer would have been perfectly legitimate, but it was the duty of the Government to prove the *actual* state of affairs if necessary for their case, which existed at the time of the homicide in reference to the way in which the vessel was loaded, but testimony as to how it was usual to load her or testimony of an hypothetical character, based upon the state of affairs of which the witness knew nothing, was clearly inadmissible and should have been rejected.

1 Greenleaf evidence, Secs. 440-441, and cases cited.

Witness may depose as to facts, within his knowledge, matters of opinion may be given in some cases, but not in one like the present. The Government had the entire crew of this vessel at its command, and could have proved the facts as they existed, as to the way the vessel was loaded. That would have been the best evidence.

1 Greenleaf evidence (15 ed.), Sec. 82.

4. The fourth assignment of error is to the exclusion of the question asked the Government's witness, John Lind.

Lind testified (pages 61 to 72 inclusive) that on the morning of the homicide the captain of the vessel, one Whitman, had beaten the prisoner, John Andersen, in reference to an affair about the captain's dog, and he stated all the facts in reference thereto.

This was brought out in full by the Government on the trial. Lind further testified that after this beating the prisoner had appealed to the mate for protection until he reached the shore, and the mate said to him, "Go to hell, you will get killed anyhow," or something like that. Pages 65-6.

The question was then asked:

Q. "Do you know of any other circumstances? Had this captain been brutal or inhuman to this cook in any other way?"

Which question the court excluded. This surely constituted a part of the transaction. It showed the condition of the mind that the prisoner was in. The jury had a right to know how the captain had treated this cook, the prisoner. The beating of him had been given in evidence, and it was a part and parcel of the transaction, and as such should have gone to the jury for what it was worth.

5. The Government alleged in its indictment that William Wallace Saunders was murdered by John Andersen, by John Andersen casting William Wallace Saunders into the sea and drowning him. The evidence of every witness for the Government was to the effect that in the altercation which occurred between the mate Saunders and the prisoner John Andersen, the mate was shot to death by Andersen. This was clearly a variance between the allegata and probata.

There is no principle of law known to the history of law by which an allegation of death by *drowning* is sustained by the proof of death by *shooting*.

The Government has its election as to the allegation of the means employed in producing the homicide, and having made that allegation it must stand to it. The indictment charging death by drowning affords no notice of the charge

of death by shooting. It is one of the principles of our law and is founded in the most ancient precepts of English jurisprudence that when a crime is charged the prosecution is called upon for a strict proof of the crime having been committed as alleged.

It is true that where there is an allegation that the crime was committed in a particular way a slight variation within the same species of the means as alleged in the indictment is permitted, but no precedent can be produced, either in England or America, of permitting the Government to allege that a man was murdered by drowning and to prove that he was shot to death.

The witnesses, Lind, p. 75; Andrew March, pp. 78, 84-85, 97; Juan De Dios Barrial, p. 94; Horsburg, 123, all testified that William Wallace Saunders was dead when he was cast into the sea by them, and the indictment alleges, p. 25, that the said John Andersen did, then and there, etc., at the time and place, etc., "cast, throw from and out of the said vessel into the sea and plunge, sink and drown him, the said William Wallace Saunders, in the sea aforesaid, of which said wounding, casting, throwing, plunging, sinking and drowning the said William Wallace Saunders in and upon the said high seas aforesaid, out of the jurisdiction of any particular state of the United States of America, then and there instantly died."

It is difficult to see how an allegation of drowning is supported by proof of shooting. He might, with the same propriety, have proved that he starved him to death or poisoned him. The Government could allege that he shot him with a gun or perhaps prove he shot him with a pistol, or cut him with a knife and prove the wonnd was made with a dirk or sword, but not by a method of a different species.

Minor's Institute of Crim. Law, page 55.

6, 7, 8, 9. John Andersen, the prisoner, was put upon the stand in his own defense and during his testimony he was asked by his counsel various questions contained in the 6, 7, 8 and 9 grounds of error. As the same reasons apply very nearly to all these four grounds of error they will be discussed together.

The questions were:

Q. "Now I want to ask this question to the witness. I want you to detail, with truth, to the jury everything which occurred in reference to this business from the time you shipped on the 16th day of June, until you left the vessel on the 6th day of August?"

Page 137 of the record.

He was also asked:

Q. "Now state to the jury all that occurred between you and the mate during that time," (meaning since his shipment in June,'97, as indicated by the previous question) "including all the facts and circumstances attending the 6th of August?"

Page 139 of the record.

He was also asked:

Q. "Now state what trouble, if any, you had with this mate previous to this occasion?"

Page 158 of the record.

And also asked:

Q. "I want to ask you whether on the day before the homicide you had had a difficulty with the mate, and without provocation on your part the mate had not attempted to throw you overboard?"

Page 161 of the record.

It is respectfully submitted that these questions called for the prisoner's defense in this matter, and that he should have been permitted to have answered all four interrogatories propounded to him. All of which questions were objected to by the Government and excluded by the Court.

It was intended to show by this line of questioning, that on this voyage which began on the 20th day of June, 1897, until the date of the homicide, which occurred on the 6th

day of August, 1897, that this man was in a constant state of terror, brought about by the cruelties of the captain and mate.

He was asked to state to the jury all facts and circumstances *which had occurred* in *reference* to the *homicide* during this period, all conditions to which he was subjected, everything that passed between him and the mate; and then to particularize, he was asked to state all facts and circumstances attending the 6th of August; intending thereby to show the cruel and inhuman treatment of the prisoner by the mate and the state of terror to which he was subjected by his cruel and inhuman conduct.

Then he was asked what trouble, if any, he had had with the mate previous to this occasion, referring, of course, to the occasion of the homicide.

He was then asked, when the three preceding questions had been ruled out, whether or not on the very day preceding the homicide he had not been assaulted by the mate, and that without provocation on his part the mate had not attempted to throw him overboard, and he was not permitted to answer.

His Honor, the Circuit Judge, ruled that Andersen was to be confined in his testimony to occurrences which took place on the day of the homicide, and that nothing which had transpired antecedent to that date, the day of the homicide, was competent testimony in the defense of the prisoner. Page 159 of the record, where will be found the opinion given by the Circuit Judge for his ruling on that point.

The condition of Andersen's mind or rather the treatment which he received by the captain and the mate anterior to the date of the homicide whereby his mind was left in such a degree of terrorism as to render him absolutely irresponsible for his actions and the provocations which he received from the beginning of this voyage to the date of the homicide, no matter how great or how violent, were absolutely excluded from the jury, by this ruling.

The fact that the mate on the day previous had assaulted

him and had attempted to throw him overboard was excluded, and the reason why Andersen believed that the mate intended to make way with him when he approached him on the morning of the homicide with the marlin spike, as if to do him great bodily harm, was taken from the jury when Andersen's answer to these questions, especially the last, were excluded by the ruling of the Court.

Andersen should have been permitted to say what had transpired between him and the mate previous to August 6th, the day of the homicide, to show in what light he had a right to regard the mates approaching him in a hostile manner on the day of the homicide.

It was very important that the jury should know the relations which existed between Andersen and the mate prior to the 6th of August, how he had treated him, whether cruelly, brutally or violently, in order that the jury might form a proper estimate of whether or not Andersen had a right to regard the demeanor of the mate towards him on morning of the 6th of August as such as to put him in bodily fear for his life or limb.

Wallace vs. U. S. 162, U. S. 466.

In Wallace's case, last cited, the accused was not allowed to answer the question as to whether he was in bodily fear of the deceased at the time of the homicide this Court held it error—that he should have been permitted to answer the question. If this be so, surely he should be permitted to state the facts and circumstances which put him in that condition of mind—that the jury might judge whether they were sufficient to do so. There was evidence tending to prove that on the occasion of the homicide the deceased had approached the prisoner in a hostile attitude, with a marlin spike in his hand, *as if* to stab him with it; previous hostile and violent acts on the part of the deceased should have been permitted to have been proved.

Kerr on Homicide, Sec. 172 and Seq.

Oder vs. The Commonwealth, 80 Kt'y, 32.

10. The witness, John Darnhardt, was asked (page 225) whether he was acquainted with the general reputation of the captain.

It must be borne in mind that on the morning of the homicide the captain had assaulted Andersen and that Andersen had appealed to the mate for protection from the captain and the mate had told him to "Go to hell, you will get killed anyhow."

Lind's testimony, pages 63-5.

Andersen's testimony, page 142.

The question was asked with a view of showing that the captain was a man of intense brutality, and that the mate was backing him in his impositions on this sailor. The terror to which Andersen was subjected was a part of his case, and the character and reputation of his captain for brutality was an incident of it. Darnhardt, who knew the facts, should have been permitted to testify as to the captain's reputation for brutality.

11 and 12. These grounds of error consist in the refusal of the trial Judge to give certain instructions asked for by the prisoner's counsel, and in lieu thereof granting a charge which is submitted was erroneous as applied to the conditions and facts of the trial at bar.

The theory, I presume, upon which the Judge's charge was given was based upon the decision in the St. Clair case 54 U.S. 134 and in Sparf's case, ~~both~~ reported in 156 U. S. 51

It excluded from the jury the question of manslaughter altogether and told the jury substantially that in the case at bar it must either find the prisoner guilty of murder, as charged in the indictment, or must acquit.

The language of the Court was: "The other felonious homicide to which I call your attention, manslaughter, is

the unlawful killing of a human being without malice, either expressed or implied. I find it to be my duty, gentlemen of the jury, to say to you that if the defendant has committed a felonious homicide, of which you are the only judges, there is nothing before you that reduces it below the grade of murder."

There is no proof in the record whatever of any grudge, premeditation or malicious intent on the part of the accused towards the deceased. It appears by the record that on the morning of the 6th of August, 1897, the deceased was killed by the accused on the deck of the schooner "Olive Pecker."

There were two versions of the affair. One given by the witness Martin Barstad (p. 41). Barstad says: "I heard a report of a shot in the captain's cabin, which was connected with the wheel-house by the after-companionway. Immediately after I saw John Andersen, the accused, come running up the after-companionway and through the wheel-house with a pistol in each hand and one in his hip pocket. He ran up to John Lind, who was standing amidship by the rigging by the middle mast. He said something to Lind, but I did not hear what it was. I heard him sing out to the mate, who was up in the cross-trees of the foremast at work in the rigging, and say, 'Come down, Mr. Saunders. The mate said, 'What do you want, steward?' In a little while the mate finished the job and started down the rigging. When about midway down, and when the cook Andersen was standing on the top of the forward house, the mate starts down and said, 'What have you got in your hands?' 'I got guns,' he says. 'Where did you get them?' says the mate. 'Down in the cabin,' he says. The mate came down and stepped on the forecastle head—not on the forecastle house. Then Andersen fired a shot, the mate reeled and faced him and said, 'For God's sake don't shoot me, cook.' The cook fired another shot, and the mate kept on reeling, and the cook fired another one and a third one, when the mate fell, and he shot him once after he had fallen."

John Lind testified (p. 54): "I saw Mate William Saunders on the 6th of August, this year. He was killed that morning by John Andersen on the forecastle head, on the left or port side thereof. I saw Andersen just before the shooting of the mate that morning coming up from the cabin through the after-companionway and through the wheel-house. I was standing amidship. He came up with a revolver in each hand. He came right up to me and asked me where the mate was and said, 'I have killed the captain and now the mate goes, too.' The mate was then aloft in the rigging of the foremast. I went down on the lee or starboard side of the vessel to the forecastle," etc. He saw no shooting.

This is all the testimony of the Government direct on the fact of the killing. If taken alone it would not have justified the charge. The killing might have been felonious, but still manslaughter, not murder. The killing might have arisen from heat of blood, sudden provocation, unjustifiable without excuse, but still not wilful, deliberate and premeditated killing; which is necessary to constitute murder.

So, therefore, if the Government's case had been taken by itself the charge of his honor the trial Judge would not have been warranted by law; he should not have excluded the question of manslaughter from the jury.

But it thoroughly ignores the testimony of the defendant.

His account of the transaction is this (his testimony begins page 141 of the record), and he states substantially that on the morning of the homicide the captain of the vessel had assaulted and beaten him;that he had appealed to the mate for protection from the captain until he got into port, who had told him, "Go to hell, you will get killed anyhow;" that his mind was in such a condition that he did not know whether to jump overboard or hide; that he looked out for another vessel, intending, if he saw any such, to endeavor to make for her: that after awhile he went into the cabin; while there the captain made an assault upon him, to defend which he shot him; that he then thought

of the mate, ran out on deck and inquired where the mate was; that he *did not* call the mate down from the rigging, and that the mate came down and said (here Andersen's testimony is given, p. 144, verbatim). He (the mate) says: "Where is the captain? where in the hell did you get them guns?" He says: "And where is the captain?" I never made no answer to him, but I stayed on top that house there as the mate came down, and he had this marlin spike around his neck. I will just show you how he had it, if you please. He had taken this hitch on this marlin spike, as represented to you before. He came down like this and walked up like this (indicating by appropriate gestures walking toward the bowsprit) and turned in this direction (to the right) and came towards me in that direction (on the starboard side). He took the half-hitch out of the marlin spike like this, and the marlin spike was hanging down when he came towards me. I was standing there and had the guns then. I had three of them, and I held them in my hand all the time. I had an apron around my waist, and I had no pockets here in the pants. He got this hitch off the marlin spike and came to me like this (indicating by proper gestures) to take the marlin spike off his neck and shove the marlin spike into me. I pulled the gun and shot him. The first shot struck him somewheres (in the side.) He was still coming towards me, and I shot twice or three times altogether, when the man fell dead. In the meantime John Lind has been running into the lee side of the house. Now, he stated here yesterday to you gentlemen that I came up to him and says, "Now the mate will go too." But that belongs on the lee side of the house to that man. When he came there he told them, "Now the mate will go too."

Q. "You mean by that that you did not say it at all?"

A. "No, sir. That belongs to John Lind and into the lee side of the forecastle; that is where that belongs. So I stood there, and John Lind he was the man that came up first and there was nobody else came up, so I says, "Men," I says, "aint you coming up," I says. In the condition I

felt, I felt actually frightened of the men the way I was, because I was completely gone."

These are as conflicting as two stories could be. If Andersen is to be believed, there is strong reason to say that he committed the homicide in self-defense. It might be urged, however, that Andersen after having killed the captain according to his own account should have hid himself out of the way of the mate, but that after going on deck and the mate having advanced on him with the marlin spike that he should have retreated as far as in safety he could have retreated before taking the mate's life, but it must be borne in mind that this was on a ship, where his means of retreat were cut off. There is no proof of any previous quarrel with the mate, no proof of any grudge or any premeditation or deliberation.

All of the hostile intention towards the mate grew out of the immediate circumstances attending the killing. Can it be said that there was no testimony in this case tending to reduce this crime from murder to manslaughter?

These facts as related by Andersen make out at most a case of manslaughter and nothing else; they at least *tend* in that direction. A jury, if they believed Andersen, could so find, and there is *some evidence* (to use the language of the decisions) of manslaughter.

This Court in a very recent case has considered this question fully and it has announced the law governing the trial court in cases of this nature.

The case of Stevenson v. U. S., 162, U. S. 313, which was decided April 13th, 1896, not yet two years ago, fully carries out the principles for which we contend. In that case the Court refused to submit the issue of manslaughter to the jury. The Supreme Court in its opinion says:

"The question is whether the Court erred in refusing this request (i. e., submit issue of manslaughter to the jury). The evidence as to manslaughter need not be *uncontradicted* or in any way conclusive upon the question; so long as there is *some* evidence upon the subject, the *proper weight* to be *given* it is for the jury to determine. If there was

any evidence which tended to show such a state of facts as might bring the crime within the grade of manslaughter it then became a proper question for the jury to say whether the evidence were true and whether it showed that the crime was manslaughter instead of murder. It is difficult to think of a case of killing by shooting where both men were armed and both in readiness to shoot, and where both did shoot, that the question would not arise for the jury to answer, whether the killing was murder or manslaughter or a pure act of self-defense. The evidence might appear to the *Court* to be *simply overwhelming* to show that the killing was in fact murder, and not manslaughter or an act performed in self-defense, and yet *so long* as there was *some* evidence *relevant* to the issue of manslaughter, the credibility and force of such evidence must be for the jury, and cannot be a matter of law for the decision of the Court."

The Court then goes on to say that in a particular case, where there was no evidence upon which to base such a finding, the Court would have the right to instruct the jury to that effect, i. e., take the issue of manslaughter from the jury, and cites

Sparf v. U. S., 156; U. S., 51.

In Sparf's case the facts were very different from this case. There three sailors entered into a conspiracy to throw the mate overboard. They endeavored to get a fourth to join them—this was in evidence by this fourth man. The facts were, they found blood on the vessel and they found a club stained with blood and hair, and identified the hair, and the mate was missing, and one of the trio had admitted to this fourth that they had thrown the mate overboard.

The trial judge in this case instructed the jury that these men were either guilty of murder or nothing, that if they believed the facts above recited that they must find a verdict for the Government.

There was in that case direct evidence of premeditation, and the corpus delicti was established. There was no evi-

dence of an affray, and direct evidence of the conspiracy to make way with this man. The cases are by no means parallel.

In the case of Stevenson, supra, the Court distinctly lays down the rule (p. 315), that where there is any evidence tending to show manslaughter, it is a question of fact for the jury and not one of law for the Court. To use the language of the Court, in Stevenson's case (p. 316): "If there were some appreciable evidence upon that subject, manslaughter, its particular weight and credibility was for the jury."

In Stevenson's case, Stevenson had a knife and the deceased a pistol. The plaintiff in error, by reason of previous circumstances, was laboring under great excitement at the saloon, and as one witness says, "seemed to be mad." "The deceased came to the door of the saloon and shot his pistol into the room, and the bullet came within a few inches of the head of the plaintiff in error, who immediately fired his rifle in the direction of the deceased. The ruling of the trial judge in effect was to say that as a matter of law there was nothing in all this evidence, if true, which would *permit* the jury to find that the plaintiff in error when he fired his rifle was so much under the influence of sudden passion, caused by these circumstances and by this assault upon him, as not to have been actuated by that malice which the law defines as a necessary ingredient in the crime of murder. Is it perfectly plain and clear as a conclusion of law that shooting at another under circumstances such as were detailed by some of the witnesses in this case, can have no tendency to raise within the mind of the person thus assaulted such a sudden passion of anger or terror as to deprive his subsequent acts of that malice which is necessary to make it murder? If it is not to be so asserted as matter of law, then it becomes a question of fact in such a case, and that question must be answered by the jury. Whether the witnesses told the truth in regard to the circumstances is not for the court to say, nor is it for the court to decide upon the weight to be given to them if proper for the consideration of the jury."

The case of Wallace against the United States, 162 U. S., p. 466, was exactly to the same effect as the case of Stevenson v. U. S. In this case, however, it arose on a question of evidence. Counsel asked Wallace, "You may state, Mr. Wallace, what Zane did at that time just before you fired the shot." A. "He just took his hands something like this (indicating) saying, "Damn you, I will kill you."

Q. "You may state to the jury from that demonstration what you believed Zane was about to do?"

To this question the plaintiff objected. The objection was sustained, and defendant excepted. But this court overruled the trial court's decision on the ground that it was for the jury to judge as to the weight of this testimony in fixing the degree of crime, if any.

The mere fact that Andersen was armed or had armed himself does not take this case from the ruling that was decided in Gourke v. U. S., 153, 183; Thompson v. U. S., 155, U. S. 27, and also Wallace v. U. S. 162, 466, which cites a number of cases, that where a deadly weapon is employed it might be manslaughter or murder according to the circumstances.

13. This assignment of error was for the refusal of the Court to correct its own error and grant a new trial for the reasons which have been set out above. The motion was made in conformity with the practice requiring a motion to be made for a new trial before the case would be considered on a writ of error.

The Circuit Court should have granted a new trial for the same reason here indicated to the Court that its judgment should be reversed.

14. The motion in arrest of judgment should have been granted for the error which appeared upon the face of the record because the record does not show that the venire for which it was used for the trial of this case was summoned pursuant to an order of the Court. So far as the record is concerned the said venire was a nullity.

Authority is given to the Circuit Court where a regular jury is summoned for the term which cannot be used for the trial of cases for any reason, that the Court may enter an order directing jurors to be summoned for the trial of any particular case. The record should show that an order of Court to this effect was entered and that a jury was summoned for that purpose.

The same points are here urged in the support of the motion in arrest of judgment as were urged as grounds of error for the Court's refusal to quash the venire alleged to have been summoned in this case and set out herein where the second ground of error is discussed.

All of which is respectfully submitted.

GEORGE McINTOSH,

Counsel for John Andersen, Plaintiff in error.